Environmental Litigation Update

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Ohio v. USAF, USDC Southern Dist Ohio, Case no. C-3-99-231

- First CAA penalty paid to a state by Air Force
  - *U.S. v. Tennessee,* 185 F.3d 529 (6th Cir. 1999) - Sovereign immunity waived by CAA
- Undisputed CAA violations
- Original demand: $204 K + prohibitory injunction
- Negotiations: penalty components, economic benefit, prohibitory injunction
- Settlement: $40 K (no injunction)
- Only paying state CAA penalties in 6th Circuit

California v. U.S., 215 F.3d 1005 (9th Cir. 2000)

- 9th Circuit vacated favorable District Court CAA sovereign immunity ruling & remanded case to state court
  - Held: CAA § 304(e) protects the states' rights to obtain any judicial remedy or sanction in any state or local court
  - Federal Removal Statute is preempted by CAA
- Petition for Rehearing Denied
- DoJ EDS recommended petitioning for cert
- DoJ Appellate Section, ENRD, and SG staff attorney recommended against cert
- DoD/GC meeting with Solicitor General

NY Dept of Env Conservation v. DoE, 218 F.3d 96 (2d Cir. 2000) "Jorling Case"

- Whether RCRA service charges were "reasonable service charges" or taxes
  - Applied *Massachusetts* test
  - U.S. conceded prongs 1 & 3
- US calculated cost/benefit ratio at 9-to-1
  - Court discounted calculation
  - Real measure is not only services actually used, but includes services & benefits available for use
- Doesn't matter if half of charges assessed go to fund NY State Superfund

NY Dept of Env Conservation v. DoE, 218 F.3d 96 (2d Cir. 2000) "Jorling Case" (cont.)

- States reasserting demands for RCRA service charges
  - Evaluate on state-by-state basis
- *U.S. v. City of Columbia,* 914 F.2d 151 (8th Cir. 1990)
  - Suggests a higher standard when a state charges the federal government
  - Court considered all facts and circumstances and evaluated the charges on the basis of the economic realities to determine the essential nature of the charge

Affirmative Cost Recovery: Kelly AFB Site D-10

- Factual investigation
- General Notice Letter and Demand for Reimbursement
  - Coordination with EPA recommended
- Special Notice Letter *(optional)*
  - CERCLA § 122(e) outlines procedures
  - Requires DoJ and EPA concurrence
- *CERCLA § 104(e) Information Request*

Affirmative Cost Recovery: Kelly AFB Site D-10

- CERCLA § 106 Order
  - DUSD(ES) authorized to order PRP to conduct response action at a DoD facility
  - EPA concurrence & state notification
  - MOU for implementation of E.O. 13016
- Litigation
  - Only DoJ EES can file cost recovery action
  - Settlement: RD/RA consent decree

New Mexico v. General Electric

- CERCLA natural resource damages test case
  - $260 million NRD demand
  - $2 billion FTCA claim
- Motion to Strike Demand for Attorneys' Fees pending
- Discovery marathon

COMMENTS

&

QUESTIONS